

**United States Department of Labor  
Employees' Compensation Appeals Board**

---

**H.M., Appellant**

**and**

**U.S. POSTAL SERVICE, GENERAL MAIL  
FACILITY, Los Angeles, CA, Employer**

---

)  
)  
)  
)  
)  
)  
)  
)  
)  
)  
)

**Docket No. 07-1382  
Issued: October 22, 2007**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On April 25, 2007 appellant, filed a timely appeal of the Office of Workers' Compensation Programs' nonmerit decision dated April 3, 2007 which denied her request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error. Because more than one year has elapsed from the last merit decision dated March 1, 2006 to the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

**ISSUE**

The issue is whether the Office properly refused to reopen appellant's claim for reconsideration of the merits under 5 U.S.C. § 8128(a) on the grounds that it was not timely filed and did not establish clear evidence of error.

**FACTUAL HISTORY**

On May 20, 2004 appellant, then a 34-year-old mail carrier, filed an occupational disease claim alleging that on March 17, 2003 she sustained a partial tear of the right rotator cuff due to

her federal job duties. She first attributed this condition to her employment on May 5, 2004. Appellant requested a push cart at that time. She stated that her supervisor assigned her more than eight hours of work a day and that she believed this caused her condition. The employing establishment controverted appellant's claim on May 21, 2004. It noted that appellant had participated in a softball game in September 2003 and joined a bowling league and bowled weekly from 2003 through 2004 using a 12- to 16-pound ball.

In a statement dated June 9, 2004, appellant noted that her employment activities included pulling letter mail, lifting and carrying bins weighing 20 to 25 pounds and loading her vehicle with six or seven, 50-pound trays. She delivered the mail using a satchel which weighed between 35 to 50 pounds. Appellant noted that she had to drop the satchel throughout the day to relieve the pressure from her shoulder and that this was what lead her to believe that her injury was work related. She reported participating in a bowling league one time per week for 32 weeks in the winter and 13 weeks in the summer. Appellant stated that her bowling ball weighed 10 pounds.

In a May 6, 2004 report, Dr. Peter B. Alexakis, a Board-certified orthopedic surgeon, stated that appellant questioned whether carrying a heavy mailbag caused her right shoulder condition or aggravated it. He diagnosed chronic tendinitis with possible secondary slight adhesive capsulitis. Dr. Alexakis stated, "As I explained to her, this may be a work-related injury from repetitive use of her upper extremity when she carried her bag." In a work release note dated May 10, 2004, Dr. Alexakis diagnosed a partial tear in the right rotator cuff and tendinitis in the right shoulder from carrying a mailbag on the right side.

By decision dated August 19, 2004, the Office denied appellant's claim finding that the medical evidence was not sufficient to establish a causal relationship between her diagnosed shoulder condition and her employment duties.

Appellant requested an oral hearing on September 1, 2004.

Dr. Alexakis completed a report on October 4, 2004 noting that appellant carried a heavy mailbag at work. He stated that appellant was part of a bowling league once a week for 32 weeks in the winter and 13 weeks in the summer using a ball that weighed 10 pounds. Dr. Alexakis stated, "In my opinion this type of injury is inconsistent with bowling." He diagnosed impingement syndrome of the right shoulder and intrasubstance tear of the supraspinatus. Dr. Alexakis stated that appellant's current conditions were the result of repetitive lifting in the performance of her job duties. He noted that appellant lifted bins weighing up to 25 pounds and trays weighing up to 50 pounds.

Dr. Sharon L. Hame, a Board-certified orthopedic surgeon of professorial rank, completed a report on April 1, 2005. She noted appellant's employment and the results of a magnetic resonance imaging (MRI) scan. Dr. Hame performed surgery for an arthroscopic right shoulder glenohumeral debridement, subacromial decompression and debridement of partial thickness rotator cuff tear on December 2, 2004. She stated, "It is my opinion that given the nature of her job as well as the overuse nature of her injury that this was a job-related injury."

Appellant testified at the oral hearing on April 21, 2005. She alleged that her right shoulder condition was work related because she experienced a burning sensation in her arm when carrying mail. Appellant described the lifting and carrying required by her position. She stated that she began bowling in 2002. Appellant testified that her physician informed her that her injury would not result from bowling, but from continuous use.

By decision dated July 5, 2005, the hearing representative affirmed the August 19, 2004 decision. He found that the medical evidence did not establish that appellant's right shoulder injury was due to her employment. The hearing representative found that Dr. Alexakis did not provide sufficient medical rationale in explaining how appellant's employment duties of lifting bins and trays of mail or carrying a mailbag resulted in her diagnosed shoulder conditions. He also noted that Dr. Alexakis did not offer any reasoning in support of his conclusion that bowling was not responsible for appellant's shoulder condition. The hearing representative found that Dr. Hume failed to provide a sufficient factual basis for her conclusion that appellant's injury was job related as she did not describe any specific employment duties which caused or contributed to right shoulder injury.

Appellant requested reconsideration on December 20, 2005 and submitted November 15, 2005 report from Dr. Hume who again attributed appellant's right shoulder condition to her employment. She stated that she had thoroughly reviewed appellant's job description, including lifting requirements and opined that appellant's right shoulder symptoms were directly related to her job activities. Dr. Hume noted that she did not mention bowling in her April 1, 2005 report as she did not feel it accounted for appellant's pain. She stated:

"The arm swing in bowling occurs below the level of the shoulder and involved a 10-pound weight. It does not involve any shoulder level or above activity. The medical rationale her injury and/or pain involves the heavy lifting and repetitive activity that she must do during her job. This repetitive activity causes inflammation and micro damage to the tendon portion of her rotator cuff ultimately resulting in a tear. The inflammation and/or impingement syndrome is consistent with this activity."

By decision dated March 1, 2006, the Office denied modification of the July 5, 2005 decision. The claims examiner found that bowling did involve arm swing movements below and above shoulder level and that appellant's physicians had not adequately explained why repeated bowling would not cause appellant's injury. He noted that additional rationalized medical opinion was required to meet appellant's burden of proof.

On March 22, 2007 appellant requested reconsideration. She submitted a report from Dr. Hume dated March 12, 2007. Dr. Hume stated, "Again I must reiterate that the biomechanics of bowling does not put the rotator cuff at risk as most of the activity is done below the shoulder line. There are no documented research studies regarding shoulder injury and bowling. There are a multitude of studies showing that overhead activity can lead to shoulder injury including impingement syndrome and rotator cuff pathology." Dr. Hume stated that she had reviewed appellant's job description and noting the activity of casing included reaching at shoulder level and above as did lifting to reach mailboxes situated above shoulder level. She noted that appellant had not bowled since 2003 and yet continued to have right shoulder

symptoms. Dr. Hume concluded that work-related activities were aggravating appellant's right shoulder condition.

By decision dated April 3, 2007, the Office declined to reopen appellant's claim for review of the merits finding that her request for reconsideration was not timely and did not establish clear evidence of error on the part of the Office. The Office found that Dr. Hume provided essentially the same information and opinion as her November 15, 2005 report which was previously considered.

### **LEGAL PRECEDENT**

Section 8128(a) of the Federal Employees' Compensation Act<sup>1</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>2</sup> This section vests the Office with discretionary authority to determine whether it will review an award for or against compensation.<sup>3</sup> The Office, through regulations has imposed limitations on the exercise of its discretionary authority. One such limitation is that the Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.<sup>4</sup> The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).<sup>5</sup>

The Office's regulations require that an application for reconsideration must be submitted in writing<sup>6</sup> and define an application for reconsideration as the request for reconsideration "along with supporting statements and evidence."<sup>7</sup> The regulations provide:

"[The Office] will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of [the Office] in its most recent decision. The application must establish, on its face that such decision was erroneous."<sup>8</sup>

---

<sup>1</sup> 5 U.S.C. § 8128(a).

<sup>2</sup> *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

<sup>3</sup> *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

<sup>4</sup> 20 C.F.R. §§ 10.607; 10.608(b). The Board has concurred in the Office's limitation of its discretionary authority; *see Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>5</sup> 5 U.S.C. § 10.607(b); *Thankamma Mathews*, *supra* note 2 at 769; *Jesus D. Sanchez*, *supra* note 3 at 967.

<sup>6</sup> 20 C.F.R. § 10.606.

<sup>7</sup> 20 C.F.R. § 10.605.

<sup>8</sup> 20 C.F.R. § 10.607(b).

In those cases where requests for reconsideration are not timely filed, the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request in accordance with section 10.607(b) of its regulations.<sup>9</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>10</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>11</sup> Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>12</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>13</sup> This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.<sup>14</sup> To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office's decision.<sup>15</sup> The Board must make an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.<sup>16</sup>

### ANALYSIS

Appellant requested reconsideration of the March 1, 2006 merit decision on March 22, 2007. As her request for reconsideration was dated more than one year following the March 1, 2006 merit decision, it was not timely. The Office properly found that appellant had not requested reconsideration in a timely manner.

The Office proceeded to evaluate the evidence that appellant submitted in support of her untimely request for reconsideration under the clear evidence of error standard. The Office had previously denied appellant's claim on the grounds that there was not sufficient rationalized medical opinion evidence to establish the causal relationship between her diagnosed right shoulder condition and her employment activities. The Office noted that appellant's nonemployment-related activity of bowling involved her right shoulder and found that

---

<sup>9</sup> *Thankamma Mathews*, *supra* note 2 at 770.

<sup>10</sup> *Id.*

<sup>11</sup> *Leona N. Travis*, 43 ECAB 227, 241 (1991).

<sup>12</sup> *Jesus D. Sanchez*, *supra* note 3 at 968.

<sup>13</sup> *Leona N. Travis*, *supra* note 9.

<sup>14</sup> *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

<sup>15</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

<sup>16</sup> *Gregory Griffin*, *supra* note 4.

appellant's physicians had not offered sufficient medical reasoning explaining why this activity was not causative of her right shoulder condition. The only evidence appellant submitted in support of her untimely request for reconsideration was the March 12, 2007 report from Dr. Hume, a Board-certified orthopedic surgeon of professorial rank, who opined that appellant's shoulder conditions were due to overhead activity performed during the course of her federal employment. She noted that appellant was required to case mail and place mail into mailboxes and that both of these activities required reaching over shoulder level. The remainder of Dr. Hume's report focused on appellant's shoulder symptoms as of the date of the report, March 12, 2007, noting that appellant had not bowled for four years and yet continued to experience right shoulder symptoms. Dr. Hume diagnosed a work-related aggravation of appellant's right shoulder.

The Board finds that Dr. Hume's report is not sufficient to establish clear evidence of error on the part of the Office. While Dr. Hume's March 12, 2007 report is relevant to the issue for which the Office denied appellant's claim as it addresses the causal relationship between appellant's employment activities and her right shoulder condition, it does not raise a substantial question concerning the correctness of the Office's decision. Dr. Hume's report is not of sufficient probative value to *prima facie* shift the weight of the evidence in favor of appellant as her conclusions relate to appellant's current and ongoing aggravation of her right shoulder injury rather than the causal relationship between appellant's employment activities and her right shoulder condition beginning on March 17, 2003. As Dr. Hume's report does not establish clear evidence of error on the part of the Office, the Office did not abuse its discretion by refusing to reopen appellant's claim for consideration of the merits on April 3, 2007.

### **CONCLUSION**

The Board finds that appellant's March 22, 2007 untimely request for reconsideration was not sufficient to establish clear evidence of error in the Office's March 1, 2006 merit decision and that the Office therefore properly declined to reopen her claim for consideration of the merits.

**ORDER**

**IT IS HEREBY ORDERED THAT** April 3, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 22, 2007  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board